United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,583 and 18,923, Consolidated

JOHN H. DAVENPORT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

Rawlings Ragland,

616 Investment Building
Washington, D. C. 20005

Attorney for Appellant,
appointed by this Court

Thomas J. Schwab,
of Counsel

STATEMENT OF QUESTIONS PRESENTED

1. Where the crime of assault with a dangerous weapon and the crime of manslaughter were committed by appellant in a single act, did the statute creating these two crimes authorize the court to sentence appellant to consecutive sentences for them?

2. Where indictments charged murder and assault with a dangerous weapon, both arising from one shooting of a victim, was assault with a dangerous weapon a lesser included offense to murder or manslaughter?

3. Where an offense and its lesser included offense are committed in the same transaction, does the applicable statute, which created both offenses, authorize consecutive punishment?

4. Where a defendant pleads guilty to assault with a dangerous weapon arising from a shooting, and where the victim is at the time still living but in danger of death, and where the defendant is advised of the maximum penalty for assault with a dangerous weapon but is not advised of the maximum penalty which could flow from a murder or manslaughter conviction based upon the same act in the event the victim dies, and is not advised that the guilty plea could be used against him in a trial for murder or manslaughter, is the plea of guilty of assault with a dangerous weapon made with understanding of its consequences?

5. Was it an abuse of discretion for the trial court to deny appellant's motion (Rule 32(d), Fed. Rul. Crim. Proc.) to withdraw his plea of guilty of assault with a dangerous weapon where appellant was unaware of serious consequences of the plea and where the plea was a substantial factor in appellant's subsequent conviction for manslaughter and in his being punished for both assault with a dangerous weapon and manslaughter as a result of his single act?

I N D E X

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Nos. 18,583 and 18,923, Consolidated

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ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The appeal in Case No. 18,923 is from an order of the United States District Court for the District of Columbia (Crim. 443-61) denying appellant's motion to withdraw his plea of guilty pursuant to Rule 32(d), Fed. Rul. Crim. Proc. Appellant had been convicted upon his plea of guilty to the counts of an indictment charging assault with a dangerous weapon and carrying of a dangerous weapon without a license. He was sentenced on August 25, 1961 to three to nine years on the assault count and one year on the carrying count, the sentences to run concurrently. The order denying the motion to withdraw the plea of guilty was entered

on February 7, 1964. A motion for leave to proceed on that appeal without prepayment of costs was filed on February 13, 1964 and was denied by the District Court on February 19, 1964. Appellant's petition to this Court for leave to prosecute the appeal without prepayment of costs was granted on September 10, 1964.

The appeal in Case No. 18,583 is from an order of the United States District Court for the District of Columbia (Crim. 255-62) denying appellant's motion to correct an illegal sentence under Rule 35, Fed. Rul. Crim. Proc. Appellant had been convicted upon his plea of guilty to the offense of manslaughter, and was sentenced on November 16, 1962 to three to nine years, the sentence to commence "upon the termination of the sentence he is now serving." The order appealed from was entered on April 13, 1964, and a motion for leave to proceed on appeal therefrom without prepayment of costs was filed April 13, 1964 and was granted by the District Court on April 14, 1964.

This Court, by Order dated September 10, 1964, directed that the appeals in the two cases be consolidated for all purposes.

The District Court had jurisdiction in each case under D. C. Code, Secs. 11-305 and 11-306 (1961) and this Court has jurisdiction under 28 U.S.C., Sec. 1291.

STATEMENT OF THE CASE

On June 12, 1961, appellant was charged (Crim. Case No. 443-61) in a three-count indictment with assault with a dangerous weapon (count one), assault with intent to kill (count two) and carrying a dangerous weapon (count three), all such charges arising from an incident which

took place on May 9, 1961, in which appellant shot one Emma Lee Hill. On June 27, 1961, appellant pleaded guilty to counts one and three of the indictment, and on August 25, 1961, was sentenced (McGarraghy, J.) to three to nine years on count one and one year on count three, the sentences to run concurrently. Count two of the indictment was dismissed on motion of the Government.

On or about February 20, 1962, Emma Lee Hill, who had been hospitalized as a result of the shooting, had left the hospital but had later returned, died. On March 26, 1962, appellant was indicted for the murder of Emma Lee Hill (Crim. Case No. 255-62). On October 11, 1962, appellant pleaded guilty to manslaughter, and on November 16, 1962, he was sentenced (Jones, J.) to three to nine years, the sentence to commence "upon the termination of the sentence he is now serving."

At the taking of the plea of guilty in No. 443-61, appellant was asked and answered the usual questions, including the question whether he had been advised as to the maximum sentence he might receive. (Tr. Sentencing, July 27, 1961, Case No. 443-61.) Appellant was not advised, however, that if the victim died within a year and a day of the shooting, he might be convicted of murder or manslaughter in connection with her death, nor was he advised as to the maximum sentence he might receive under those circumstances, nor was he advised that his guilty plea to assault with a dangerous weapon could be used against him in a subsequent homicide trial. (Tr. Hearing on Defendant's Motion for Withdrawal of Plea of Guilty, February 7, 1964, Case No. 443-61, p. 2.)

STATUTES AND RULE INVOLVED

District of Columbia Code (1961), Sec. 22-502 (Mar. 3, 1901, 31 Stat. 1321), provides:

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

District of Columbia Code (1961), Sec. 22-2405 (Mar. 3, 1901, 31 Stat. 1321), provides:

"Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment."

Rule 32(d), Fed. Rul. Crim. Proc., provides:

"Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

STATEMENT OF POINTS ON APPEAL

(1) The trial court erred in denying appellant's motion, pursuant to Rule 35, Fed. Rul. Crim. Proc., to correct his sentence on the manslaughter charge.

(2) The trial court erred in denying appellant's motion, pursuant to Rule 32(d), Fed. Rul. Crim. Proc., to withdraw his plea of guilty to the assault with a dangerous weapon charge.

SUMMARY OF ARGUMENT

(1) The two crimes for which appellant was convicted and sentenced consecutively arose from but a single act on his part, and, furthermore, the crime of manslaughter was a greater offense of which the crime of assault with a dangerous weapon was a lesser included offense. Under these circumstances, the District Court was not authorized by the

applicable statute to sentence appellant to consecutive terms for the two crimes. The District Court therefore erred in refusing to grant appellant's motion under Rule 35, Fed. Rul. Crim. Proc., to correct the manslaughter sentence.

(2) Appellant began to serve his manslaughter sentence, at the latest, on August 26, 1964. Since the manslaughter sentence was valid except in the respect that it was to run consecutively with the assault with a dangerous weapon sentence, and since appellant was serving under it, the trial court may not now increase the manslaughter sentence. Accordingly, the proper disposition of this appeal is to direct that the manslaughter sentence be corrected so as to run concurrently with the assault with a dangerous weapon sentence -- i.e., to commence as of August 25, 1961.

(3) Since appellant was not advised at the time he pleaded guilty to the assault with a dangerous weapon charge that if the victim died he could thereafter be punished for murder or manslaughter, nor was he advised that the guilty plea could be used to establish his guilt of murder or manslaughter, appellant did not realize the true consequences of that guilty plea. Accordingly, the plea should not have been accepted, and, appellant having been substantially prejudiced by the plea, it was an abuse of discretion for the trial court to deny appellant's motion to withdraw it pursuant to Rule 32(d), Fed. Rul. Crim. Proc.

(4) Since the trial court should have granted appellant's motion to withdraw the guilty plea, this Court should now vacate the sentence on the assault with a dangerous weapon charge. Moreover, the Court should direct that the indictment in that case be dismissed,

because appellant, having been convicted of manslaughter in the shooting of decedent, cannot now be tried for the lesser included offense of assaulting decedent with a dangerous weapon.

ARGUMENT

I. CONSECUTIVE SENTENCES FOR MANSLAUGHTER AND FOR ASSAULT WITH A DANGEROUS WEAPON COULD NOT LAWFULLY BE IMPOSED UPON APPELLANT SINCE THE TWO CRIMES AROSE FROM A SINGLE ACT AND SINCE ASSAULT WITH A DANGEROUS WEAPON WAS A LESSER INCLUDED OFFENSE OF MANSLAUGHTER.

Appellant was first convicted of assault with a dangerous weapon and sentenced to a term of three to nine years. The act charged in the indictment for that offense was the shooting of Emma Lee Hill with a pistol on May 9, 1961. Appellant was then convicted of manslaughter and sentenced to a term of three to nine years, to run consecutively with the previous sentence. The act charged in the second indictment was also the shooting of Emma Lee Hill with a pistol on May 9, 1961. It is appellant's position that where two crimes are committed by a single act, there is a presumption that the legislature did not intend to authorize cumulative punishment, that a like presumption against cumulative punishment arises where a defendant is convicted of two crimes committed in a single transaction of which one is a greater offense and the other a lesser included offense within that greater offense, and that, on the basis of these presumptions and the practices of criminal courts both before and after passage of the legislation here involved, it must be concluded that the statute under which appellant was convicted did not authorize the imposition of cumulative punishment -- i.e., consecutive sentences.

In Evans v. United States, 98 U.S. App. D.C. 122, 123, 232 F.2d 379, 380 (1956), this Court had before it a defendant convicted of grand larceny (22 D.C. Code, Sec. 2201) and unauthorized use of a vehicle (22 D.C. Code, Sec. 2204), both arising out of the same act. The Court, in a unanimous opinion, observed:

> "The same act may at times constitute two offenses and justify findings of guilty on two counts, and separate sentences thereon may be imposed, provided they run concurrently *** The sentence under the grand larceny count was no greater than the court had the right to impose. A different result would probably be necessary if the sentences had been imposed to run consecutively."

Insofar as counsel has been able to determine, this view is consistent with historical criminal law practice at common law. While the consequences of two convictions based upon a single act have usually arisen before the courts not in the context of an attack on cumulative punishment, but rather in the context of a claim of double jeopardy, it is believed that rarely, if ever, has cumulative punishment been imposed with respect to two offenses arising from but a single act.

The rule suggested in the Evans case is consistent with a number of decisions of the United States Supreme Court which establish a presumption that where two statutory crimes are committed by a single act, the legislature did not intend that cumulative punishment be imposed. In Ladner v. United States, 358 U.S. 169 (1958), the Supreme Court was faced with the question of whether Congress intended that one who shot once and thereby wounded two federal officers was guilty of two assaults, or but one. The answer given by the Supreme Court -- i.e., one assault -- is of less importance to the instant case than is the approach used in reaching it:

> "Neither the wording of the statute nor its legislative history points clearly to either meaning. In that circumstance the Court applies a policy of lenity and adopts the less harsh meaning. '/W/hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.' *** This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." (358 U.S. at 177, 178)

Thus, the approach of Ladner is that the ambiguity in the statute is to be resolved in favor of lenity, in favor of the less harsh punishment -- in short, in favor of one punishment, not two punishments. The same approach, with the same result, was used by the Supreme Court in Heflin v. United States 358 U.S. 415 (1959) and in Prince v. United States, 352 U.S. 322 (1957), both arising under the Federal Bank Robbery Act. In Prince the Court held that the crime of entry into a bank with intent to rob was not intended to be a separate offense from the robbery itself (18 U.S.C., Sec. 2113). In Heflin the Court reached a similar result with respect to bank robbery and receiving property stolen from a bank (18 U.S.C., Sec. 2113(c) and (d)). In describing in Heflin its earlier decision in Prince, the Court said:

> "We gave the Act that construction because we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act." (358 U.S. at 419)

The approach of the Supreme Court in Ladner, Heflin and Prince is clearly applicable to this case, and in the absence of a showing of a legislative intent to punish twice, the result should also be the same. It is true, of course, that Ladner differs from the instant case in that

the two punishments there involved two violations of one statutory provision arising from a single act, rather than one violation of each of two provisions of a statute arising from a single act. Appellant submits that this difference should not change the issue to be decided nor the approach of the court in deciding it. In the first place, it should be noted that two statutory provisions, not one, were involved in Heflin. Moreover, the application of statutory language to a single act may be just as ambiguous, if not more so, where two statutory provisions are involved as where there is but one. Accordingly, the presumption of Ladner that the legislature intended the less harsh result is just as applicable in this case as it was in Ladner.[1/]

The presumption as to the legislative intent on the issue of cumulative punishment, as established in Ladner and the other cited cases, is matched by a presumption against cumulative punishment where a defendant is convicted of two offenses in a single transaction, of which one is the greater offense and the other a lesser included one. In every case which appellant has been able to find and in which the court was faced with the question of whether statutes imposing penalties for two separate crimes, of which one is a lesser included offense of the other, should be construed as authorizing cumulative punishment, the court has concluded that cumulative punishment was not authorized. Dear Wing Jung v. United States, 312 F.2d 73, 75 (9th Cir. 1962); Ekberg v. United States, 167 F.2d 380, 385 (1st Cir. 1948); Costner v. United

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[1/] The presumption can, of course, be overcome by a showing of a contrary legislative intent. See Gore v. United States, 357 U.S. 386 (1958).

States, 139 F.2d 429, 432 (4th Cir. 1943).2/ As pointed out in a note, "Consecutive Sentences in Single Prosecutions," 67 Yale Law Journal 916, 925 (1958):

> "In the related area of lesser included offenses, courts have never imposed cumulative punishment. *** a presumption of legislative intent not to allow ... cumulative punishment would thus appear justified in cases involving included offenses ...."

The concept of a lesser included offense is a familiar one in the criminal law. The present expression of it is found in Rule 31(c), Fed. Rul. Crim. Proc., which provides that a defendant "may be found guilty of an offense necessarily included in the offense charged." According to the Note of the Advisory Committee on the Criminal Rules, Rule 31(c) was "a restatement of existing law." The test of whether one offense is "necessarily included" in the other, as stated by the Supreme Court in Berra v. United States, 351 U.S. 131, 134 (1955), is whether "some of the elements of the crime charged themselves constitute a lesser crime." This test has been followed by the courts. See Giles v. United States, 144 F.2d 860 (9th Cir. 1944); James v. United States, 238 F.2d 681 (9th Cir. 1946); Larson v. United States, 296 F.2d 80 (10th Cir. 1961).

The indictment which led to appellant's conviction of assault with a dangerous weapon read as follows:

2/"An indictment may charge two offenses in separate counts even though the elements of one are included in the elements of the other. If the accused is convicted upon both counts, concurrent sentences must be imposed." Brief filed in this Court by the United States Attorney in Naples v. United States of America (No. 18,186, Brief filed April 27, 1964), page 47.

> "On or about May 9, 1961, within the District of Columbia, John H. Davenport made an assault on Emma Lee Hill with a dangerous weapon, that is, a pistol."

The indictment which led to appellant's conviction of manslaughter read as follows:

> "On or about May 9, 1961, within the District of Columbia, John H. Davenport, purposely and with deliberate and premeditated malice, murdered Emma Lee Hill by means of shooting her with a pistol causing injuries from which the said Emma Lee Hill did die on or about February 20, 1962."

It is obvious, upon the basis of these two indictments alone, that the offenses of which appellant was convicted grew out of a single transaction and that the elements of the greater crime which was charged themselves constituted the lesser crime which was charged. Proof of the offense of manslaughter under the murder indictment would have to have shown that appellant shot Emma Lee Hill with a pistol on May 9, 1961. While such proof of such facts would not have been sufficient proof of murder, it would have been impossible to make out a case of either murder or manslaughter under this indictment without at least proving such facts. The proof of such facts alone, however, would clearly establish the offense of assault with a dangerous weapon. Accordingly, in this case, the crime of assault with a dangerous weapon was a lesser included offense to the crime of manslaughter.3/

3/ Many of the cases involving lesser included offenses arise over the procedural issue of whether the trial court erred in refusing to give an instruction that the jury could find the defendant guilty of the alleged lesser included offense. The test for determining whether a defendant is entitled to an instruction on a lesser included offense is set forth in the Berra case:

> "In a case where some of the elements of the crime charged themselves constitute a lesser crime,

In those cases in which courts have had occasion to consider the question, it is uniformly held or stated that assault is a lesser included offense to manslaughter or murder. Thus, in Logan v. United States, 144 U.S. 263, 307 (1892), the Supreme Court observed that:

> "An indictment for a capital offence usually includes an offence less than capital, and the defendant may be convicted of either. For instance, one indicted for murder may be convicted of manslaughter, or of an assault only (emphasis added)."

In United States v. Hamilton, 182 F. Supp. 548, 551 (D.C. 1960), the court observed:

> "As has been indicated by the Supreme Court, assault is a lesser included offense in an indictment for murder," (citing the Logan case).

See also State v. Yingling, 44 N.E. 2d 361 (Court of Appeals of Ohio, 1942).

In view of the foregoing, it is submitted that assault with a dangerous weapon in this case was a lesser included offense to manslaughter. Upon the authority of the Ekberg, Dear Wing Jung and Costner cases, cited at pages 9 and 10 above, this Court should hold that under such circumstances cumulative punishment for the two offenses was not authorized.

> the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense." 351 U.S. at 134.

Appellant submits that had he been indicted only once, and had that indictment been for murder or manslaughter, there is no question but that under the test of the Berra case he would have been entitled to an instruction concerning assault with a dangerous weapon.

The facts of this case are to be distinguished from those in Crosby v. United States, ___U.S. App. D.C.__,__F.2d ___ (No. 18322, decided November 25, 1964) in which proof that Crosby stole a wallet and money from the complainant, which established the crime of robbery, did not thereby also establish the crime of assault with a dangerous weapon, which was proved in that case by additional proof that Crosby had previously struck the complainant with a bottle -- hence, assault with a dangerous weapon in that case was not a lesser included offense to robbery.

The process by which decisions were reached in the cases holding that cumulative punishment was not authorized with respect to a greater and a lesser included offense has been one of statutory construction, just as it was in those cases referred to earlier in this brief (p. 8, supra.) which reached the same result with respect to two offenses arising from a single act. In each case the question is what was the intent of the legislature. It appears from the cases cited with respect to greater and lesser included offenses that the courts presume, in the absence of indications to the contrary, that the legislature, in establishing greater and lesser offenses, did not intend thereby to authorize cumulative punishment where a defendant is convicted of both offenses arising from a single transaction. As the Supreme Court commented in Prince v. United States, supra. (352 U.S. at 327), with respect to the National Bank Robbery Act: "It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress also intended to pyramid the penalties."

Further support for an interpretation of the legislative intent against cumulative punishment in this case may be found, it is submitted, in what appellant believes to have been the prevailing practices of the criminal courts prior to passage in 1901 of the District of Columbia statute relating to assault with a dangerous weapon and manslaughter, and in what is believed to be prevailing practices in the District of Columbia under that legislation subsequent to 1901. While counsel has not been able to find any case or treatise authority bearing directly on the question, he believes that it has never been the practice of the criminal courts, at common law in England or this country,

where a defendant is believed to have committed an offense (such as murder) the proof of which would also involve proof of one or more lesser included offenses (such as manslaughter, assault with a dangerous weapon, simple assault, etc.), to convict the defendant not only of the greater offense but also of the lesser offenses and to punish him cumulatively for the two offenses. Such has certainly not been the practice in the District of Columbia since passage of the 1901 legislation. It should not be presumed that Congress in 1901 intended a result contrary to the ordinary practice of the common law known to it at that time.

It is of historical interest to note that at common law it was held that no double jeopardy resulted in a situation such as that presented by this case -- i.e., an assault, followed by a conviction for assault, followed by death of the victim, followed by a conviction for murder or manslaughter. Insofar as counsel has been able to determine, however, there is no indication that cumulative punishment was imposed in such situations. If, as appellant contends, cumulative punishment could not be imposed where a defendant is tried at one time for both assault and manslaughter, the victim having already died, it is difficult to see any reason, in logic or in the objectives of the criminal law, why the result should be different where the victim dies following an assault conviction but before a manslaughter conviction.

In summary, the cases establish that where greater and lesser included offenses are proved within a single transaction, and where two crimes are proved by the commission of a single act, there exist presumptions that the legislature did not intend cumulative punishment, and these presumptions are supported by the general practices of the courts

regarding the two offenses here involved. Even if there could be doubt as to the proper construction of the applicable statute, such doubt would have to be resolved against a construction authorizing cumulative punishment, both because of the application of the policy of lenity referred to in the Ladner case and because of the declaration of the United States Supreme Court in Bell v. United States, 349 U.S. 81, 83 (1955) that:

> "It may be fairly said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

II. SINCE APPELLANT HAS COMMENCED TO SERVE UNDER A LAWFUL SENTENCE FOR MANSLAUGHTER, THE SENTENCE MAY NOT BE INCREASED OR MADE MORE SEVERE. ACCORDINGLY, IT SHOULD BE CORRECTED TO RUN CONCURRENTLY WITH THE SENTENCE FOR ASSAULT WITH A DANGEROUS WEAPON -- i.e., TO COMMENCE AUGUST 25, 1961.

Appellant does not contest the propriety of his conviction for manslaughter nor the legality of his sentence except insofar as it was to run consecutively with his sentence for assault with a dangerous weapon. It is clear, moreover, that appellant has commenced to serve confinement under that sentence. The sentences imposed upon appellant were one year for carrying a pistol without a license and three years for assault with a dangerous weapon, these sentences to run concurrently, and three to nine years for manslaughter, such sentence "to commence upon the termination of the sentence he is now serving." These sentences, in sequence, authorized appellant's imprisonment for an aggregate period of six to eighteen years, see Greene v. United States, 358 U.S. 326 (1959). Appellant's sentence for manslaughter therefore

began to run after he had served the minimum portion of his sentence for assault with a dangerous weapon. Since appellant's confinement under the latter sentence commenced on August 25, 1961, he completed the minimum portion thereof on August 25, 1964, and, accordingly, he commenced to serve confinement under the manslaughter sentence on August 26, 1964.

It is submitted, under the authority of Tatum v. United States, 114 App. D.C. 49, 310 F.2d 854 (1962), that a lawful sentence having been imposed on appellant, and confinement thereunder having commenced, that sentence may not now be increased or made more severe. In the Tatum case, as here, this Court had before it the question of correction of a sentence which was illegal only in part. A sentence of three to nine years had been imposed under the Federal Youth Corrections Act, 18 U.S.C. 5010(c) (1958), for robbery, although the Act did not permit the imposition of a minimum sentence. Upon motion to correct the sentence, the lower court vacated the sentence and imposed a new sentence of thirty-four months to one hundred and two months under the indeterminate sentence law, D.C. Code 24-203 (1961). Upon motion to correct the second sentence, this Court stated:

> "If appellant's first sentence was lawful a second sentence could not lawfully be imposed which increased it or made it more severe, once he had commenced serving confinement under it. Ex parte Lange, 85 U.S. (18 Wall.), 163, 173, 21 L. Ed. 872 (1873); In re Bradley, 318 U.S. 50, 63 S. Ct. 470, 87 L. Ed 500 (1943). Cf. United States v. Benz, 282 U.S. 304, 51 S. Ct. 113, 75 L. Ed. 354 (1931). See also United States v. Rosenstreich, 204 F. 2d 321 (2d Cir. 1953). The first sentence although erroneous in that part which undertook to fix a three year minimum, was a lawful sentence which appellant began to serve as a sentence under the Youth Corrections Act. Therefore, a new sentence could not lawfully be imposed if it was increased or more severe." (114 App. D.C. at 50, 310 F.2d at 855)

The Court found that the second sentence was more severe than the sentence first imposed and directed that the second sentence be set aside and that the appellant be resentenced under the Youth Corrections Act, stating that its action would "operate, in effect, to reinstate the sentence first imposed carrying no minimum."

The Tatum case and the cases cited therein clearly establish that the sentence of three to nine years imposed for manslaughter in this case may not be increased or made more severe. Accordingly, while a sentence of five to fifteen years might have been imposed for manslaughter, if made to run concurrently, a sentence of more than three to nine years may not now be imposed, even were it for the purpose of carrying out the intention of the District Judge at the time of sentencing. See also Duggins v. United States, 240 F.2d 479, 482 (6th Cir. 1957) and Miller v. United States, 147 F.2d 372 (2nd Cir. 1945). Since, for the reasons set forth in paragraph I above, appellant's sentence for manslaughter must run concurrently with his sentence for assault with a dangerous weapon, i.e., must begin to run on August 25, 1961, the maximum sentence which can now be imposed upon appellant would be a period of three to nine years, commencing August 25, 1961. There being no reason to believe that the sentencing court would now desire to impose any less harsh sentence than the maximum which could now be imposed, it is suggested that the proper disposition of this case would be for this Court to direct imposition of a sentence for manslaughter of three to nine years, commencing August 25, 1961.

III. IF THE COURT HOLDS THAT CONSECUTIVE SENTENCES COULD BE IMPOSED FOR MANSLAUGHTER AND ASSAULT WITH A DANGEROUS WEAPON, IT SHOULD SET ASIDE THE CONVICTION FOR ASSAULT WITH A DANGEROUS WEAPON AND DIRECT THAT THE INDICTMENT IN THAT CASE BE DISMISSED:

A. IT WAS AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY APPELLANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY TO THE ASSAULT WITH A DANGEROUS WEAPON CHARGE BECAUSE THE PLEA WAS NOT MADE WITH UNDERSTANDING OF ITS CONSEQUENCES AND BECAUSE THE GRANTING OF THE MOTION WAS NECESSARY IN ORDER TO CORRECT MANIFEST INJUSTICE.

B. APPELLANT, HAVING BEEN CONVICTED OF THE GREATER OFFENSE OF MANSLAUGHTER OF WHICH ASSAULT WITH A DANGEROUS WEAPON IS A LESSER OFFENSE, CANNOT NOW BE TRIED FOR THE LESSER OFFENSE.

Appellant has contended, under argument heading I above, that the sentence on his manslaughter conviction could not lawfully run consecutively with the sentence on his assault with a dangerous weapon conviction, and has further contended, under argument heading II above, that the proper disposition of the case should be that his manslaughter sentence be corrected to run concurrently with his assault with a dangerous weapon sentence -- i.e., to commence August 25, 1961. Since the sentences for the two offenses were identical in length, it follows that in the event the court grants this relief, appellant's conviction for assault with a dangerous weapon would have no further practical significance. Accordingly, if the court grants such relief, it would be unnecessary for the court to consider appellant's appeal from the denial of his motion to withdraw his plea of guilty to the assault with a dangerous weapon charge. In the event the court denies such relief, however, it is respectfully submitted that the court should set aside

appellant's conviction for assault with a dangerous weapon and direct that the indictment on that charge be dismissed.[4/]

A. IT WAS AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY APPELLANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY TO THE ASSAULT WITH A DANGEROUS WEAPON CHARGE BECAUSE THE PLEA WAS NOT MADE WITH UNDERSTANDING OF ITS CONSEQUENCES AND BECAUSE THE GRANTING OF THE MOTION WAS NECESSARY IN ORDER TO CORRECT MANIFEST INJUSTICE.

It is stipulated in this case (see Transcript of the hearing on the motion to withdraw plea of guilty, Crim. Case No. 433-61, page 2) that at the time of the entry of the plea of guilty, appellant:

> "did not know that should the woman die, he could be indicted and tried for the homicide on the woman after he had pled guilty to assault with a dangerous weapon in the same transaction."

It is further stipulated that appellant:

> "did not know that his statement that he committed the assault with a dangerous weapon would be an admission that could be used against him were he to testify in a subsequent homicide trial."

It is well settled that a plea of guilty shall not be accepted "unless made voluntarily after proper advice and with full understanding of the consequences," Kercheval v. United States, 274 U.S. 220, 223 (1926); Edwards v. United States, 103 U.S. App. D.C. 152, 155, 256 F.2d 707, 710 (1958); Shelton v. United States, 272 F.2d 346 (7th Cir. 1961), cert. den., 369 U.S. 877. See Rule 11, Fed. Rul. Crim. Proc. Such consequences include "the range of allowable punishments *** and all other facts essential to a broad understanding of the whole matter,"

4/ In such event, the manslaughter sentence would commence to run as of the date the assault with a dangerous weapon ran -- i.e., August 25, 1961. Blitz v. United States, 153 U.S. 308 (1894).

Von Moltke v. Gillies, 332 U.S. 708, 724 (1947), quoted in United States v. Lester, 247 F.2d 496, 500 (2d Cir. 1957).

Appellant's plea of guilty to the assault with a dangerous weapon charge was clearly not made with full understanding of its consequences. On the contrary, appellant obviously was not remotely aware of very serious such consequences. Under the circumstances of this case, the fact that appellant pleaded guilty to assaulting Emma Hill with a dangerous weapon by shooting her with a pistol would surely be relevant in a trial for the murder or manslaughter of Emma Hill by the same shot. Indeed, the guilty plea, when coupled with proof of the death of Emma Hill, might well be sufficient evidence upon which to establish a manslaughter conviction. The death of Emma Hill was, at the time the plea was taken, a circumstance wholly without the control of appellant, and one the possibility of which could certainly not then be ignored altogether. Under these circumstances, the consequences of appellant's plea of guilty to the assault with a dangerous weapon charge went far beyond the maximum punishment which he could have received upon a conviction for that crime.5/ It appearing that appellant was not advised that if the victim died he could be tried for murder or manslaughter,

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5/Appellant's plea of guilty to assault with a dangerous weapon was followed by a dismissal of the count of the first indictment which charged him with assault with intent to kill, a crime carrying a more severe penalty than assault with a dangerous weapon. It is not unlikely that such a dismissal had been discussed between appellant's counsel and the Government before the plea was taken and that it was a factor in appellant's plea of guilty to the lesser offense of assault with a dangerous weapon. It is ironic, to say the least, that by reason of a circumstance over which appellant then had no control whatsoever, the death of Emma Hill, appellant was later convicted of an offense with even graver consequences than assault with intent to kill.

that he was not advised of the maximum punishments for murder or manslaughter, and that he was not advised that his plea of guilty could be used against him at a trial for these offenses, and that the plea, together with the death of the victim, might be sufficient evidence to convict him of manslaughter, it must be concluded that appellant was not advised of the consequences of his plea and the plea was therefore improperly taken.

It is true that under Rule 32(d), Fed. Rul. Crim. Proc., appellant's motion to withdraw his plea of guilty, having been made after sentence, should have been granted only to correct "manifest injustice." It is submitted that withdrawal of the plea was necessary to correct "manifest injustice" in this case because in all likelihood the plea of guilty to the assault with a dangerous weapon charge was a material factor not only in appellant's plea of guilty to, and conviction of, manslaughter, but also in his being punished for both manslaughter and assault with a dangerous weapon arising from a single act on his part.

Appellant's trial counsel, who presumably advised him to plead guilty to manslaughter, was faced with an indictment for murder and a situation in which, as indicated above, the prior guilty plea would constitute substantial evidence of murder and would constitute a virtually irrebuttable case of manslaughter. Under such circumstances, counsel had but little choice in advising appellant to plead guilty to manslaughter. There can therefore be no question but that the plea of guilty to assault with a dangerous weapon was a material factor in appellant's plea of guilty, and hence his conviction, of manslaughter. Moreover, the assault with a dangerous weapon plea was also a factor in

appellant's double punishment, for had he pleaded not guilty to that charge, it is more than likely that the trial on that offense would not have taken place by the time the victim died, and it is also more than likely that, had such a sequence of events taken place, appellant would simply have been tried on the indictment for murder and not for this offense together with assault with a dangerous weapon.

In Carter v. United States, 113 U.S. App. D.C. 123, 306 F.2d 283 (1962), this Court suggested the applicability of Rule 32(d) to a situation very much like that here involved. In that case the defendant pleaded guilty to petty larceny, knowing that it carried a maximum one year sentence. The trial judge sentenced him under the Youth Corrections Act, and such sentence could have involved incarceration up to four years. On appeal, this Court held that the District Court had the right under the circumstances of the case to sentence the defendant under the Youth Corrections Act. The Court, however, observed that although no Rule 32(d) motion had been made, there might be a basis for such a motion since the defendant may have been under a misapprehension, at the time he pleaded guilty, that he could be sentenced under the Youth Corrections Act. Accordingly, the Court set aside the conviction and remanded the case to the District Court in order to permit the defendant to make a motion under Rule 32(d). See also Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963). It is clearly implicit in these cases that "manifest injustice" may well be present where a defendant pleads guilty under the impression that he understands the consequences of that plea, whereas in fact the full consequences thereof are far more harmful to him than he realizes when he pleads. It is

submitted that the factors set forth above indicate "manifest injustice" in this case to such an extent that it was an abuse of discretion for the District Court to deny appellant's motion to withdraw his plea of guilty to the assault with a dangerous weapon charge.

B. APPELLANT, HAVING BEEN CONVICTED OF THE GREATER OFFENSE OF MANSLAUGHTER OF WHICH ASSAULT WITH A DANGEROUS WEAPON IS A LESSER OFFENSE, CANNOT NOW BE TRIED FOR THE LESSER OFFENSE.

As set forth under argument heading I above, assault with a dangerous weapon, under the circumstances of this case, was a lesser included offense of which manslaughter was the greater offense. "It is familiar learning that there are many cases in which a conviction or an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one." Hans Nielsen, Petitioner, 131 U.S. 176, 189 (1889). Appellant, having been convicted of manslaughter for the shooting of Emma Lee Hill on May 9, 1961, may therefore not now be tried for the lesser crime of assaulting Emma Lee Hill with a dangerous weapon arising from the identical act on his part. Accordingly, the court should set aside appellant's conviction for assault with a dangerous weapon and direct that the indictment against appellant on that charge be dismissed.

CONCLUSION

For the reasons set forth above, it is submitted that the Court should vacate appellant's sentence for manslaughter and direct that it be corrected to run concurrently with his sentence for assault with a dangerous weapon -- i.e., to commence as of August 25, 1961. If the

Court does not grant such relief, it is submitted that the Court should set aside appellant's conviction for assault with a dangerous weapon and direct that the indictment against him for that offense be dismissed.

Respectfully submitted,

Rawlings Ragland
616 Investment Building
Washington, D. C. 20005
Attorney for Appellant
Appointed by this Court

Thomas J. Schwab
of Counsel

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18583 and 18923

JOHN H. DAVENPORT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOHN A. TERRY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

Appellant pleaded guilty to assault with a dangerous weapon (a pistol) and was sentenced to three to nine years' imprisonment while his victim lay injured in the hospital. Several months thereafter the victim died of her wounds, and appellant was indicted for first-degree murder. Upon a plea of guilty to manslaughter he was given a sentence of three to nine years, to run consecutively to that which he was already serving. Appellant has never denied his guilt of either offense. In the opinion of appellee the following questions are presented:

1. Is assault with a dangerous weapon a lesser included offense in the crime of manslaughter?
2. Was appellant's motion to withdraw his guilty plea in the assault with a dangerous weapon case, filed more than two years after imposition of sentence, properly denied, the court holding that manifest injustice had not been shown?
3. Was appellant's three- to nine-year sentence for manslaughter legal within the meaning of Rule 35, F.R. Crim. P., when the maximum possible sentence for manslaughter is fifteen years?
4. If any or all of the foregoing questions are answered favorably to appellant, what relief is now available to him?

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TABLE OF CASES

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OTHER REFERENCES

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* Cases and authorities chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 9, 1961, Emma Lee Hill was shot and seriously injured. The pistol was wielded by John H. Davenport, who shortly thereafter turned himself in to the police (A Tr. 2).[1] Davenport was charged in a three-count indict-

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[1] The pertinent transcripts will be cited herein by letter. "A Tr." refers to the transcript of proceedings in Criminal No. 255-62 before Judge Jones on November 16, 1962 (sentencing), and October 11, 1963 (hearing on motion for correction of sentence). "B Tr." refers to the transcript of proceedings in Criminal No. 443-61 before Judge McGarraghy on February 7, 1964 (hearing on motion to withdraw plea of guilty).

ment filed June 12, 1961, in Criminal Case No. 443-61 with the crimes of assault with a dangerous weapon, assault with intent to kill, and carrying a dangerous weapon. On July 27, 1961, he entered pleas of guilty to the first and third counts of the indictment. Concurrent prison sentences of three to nine years on the first count (assault with a dangerous weapon) and one year on the third count (carrying a dangerous weapon) were imposed by Judge McGarraghy on August 25, 1961. The second count, charging assault with intent to kill, was dismissed at the time of sentencing.

Emma Lee Hill remained partially paralyzed and in grave condition for several months (A Tr. 10). Early in February 1962 she was discharged from the hospital, arrangements having been made for her to receive necessary medical care and treatment elsewhere. About two weeks later she returned to the hospital suffering from peritonitis in an advanced state, of which she died on February 20 (A Tr. 3-4). The peritonitis was a direct result of the shooting nine months earlier, and accordingly John H. Davenport was indicted on March 26, 1962, in Criminal Case No. 255-62 for murder in the first degree. On October 11, 1962, Davenport pleaded guilty to manslaughter as a lesser included offense under the indictment. He was sentenced by Judge Jones on November 16, 1962, to be imprisoned for a term of three to nine years, "which sentence will commence upon the termination of the sentence he is now serving"—*i.e.*, the three to nine years imposed in Criminal No. 443-61.

On July 18, 1963, Davenport filed in Criminal No. 255-62 a motion for correction of an illegal sentence under Rule 35, F.R. Crim. P., wherein he asked that the manslaughter sentence be corrected so that it would run concurrently with, rather than consecutively to, the assault with a dangerous weapon sentence in the other case. After hearing argument and receiving memoranda from counsel the court denied the motion on April 3, 1964. This appeal (No. 18583) followed.

On November 22, 1963, Davenport filed in Criminal No. 443-61 a motion to withdraw his plea of guilty under Rule 32 (d), F.R. Crim. P., wherein he contended that he had not entered the plea to the charge of assault with a dangerous weapon understandingly and with full knowledge of its consequences. The motion was denied after a hearing on February 7, 1964. This appeal (No. 18923) followed.

STATUTES INVOLVED

Title 22, § 502, District of Columbia Code, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, § 2401, District of Columbia Code, provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Title 22, § 2405, District of Columbia Code, provides:

> Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

RULES INVOLVED

Rule 32 (d), Federal Rules of Criminal Procedure, provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Rule 35, Federal Rules of Criminal Procedure, provides:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

SUMMARY OF ARGUMENT

Where the same act or transaction constitutes a violation of two separate statutes, consecutive sentences may be imposed upon conviction of both, provided that in contemplation of law two offenses rather than one have been committed. The test to be applied in such a situation is whether each violation requires proof of a fact which the other does not. If this test is met, then the fact that both charges grow out of one transaction does not combine them into a single offense. The two crimes of which appellant was convicted can be thus distinguished from each other. Assault with a dangerous weapon requires proof of the use of a weapon, not necessary in manslaughter or murder, whereas an essential element of manslaughter is the death of a human being, which is not involved in assault with a dangerous weapon. It necessarily follows that neither is included in the other, and a conviction of one will not bar prosecution for the other and will not prevent the imposition of consecutive sentences.

A motion to withdraw a guilty plea, filed after sentence is imposed, need be granted only to correct manifest injustice. The burden of proving manifest injustice is on

the movant. Appellant has failed to sustain his burden, nor has he made an adequate showing that he did not understand the consequences of his plea at the time it was entered.

A sentence is not illegal within the meaning of Rule 35, F.R. Crim. P., if it is within the limits established by law and is authorized by the judgment of conviction. Both sentences imposed on appellant were legally imposed within the statutory maximum. The mere fact that the court directed that they be served consecutively does not make them illegal, nor can it be regarded as an abuse of discretion on the part of the second sentencing judge.

Assuming *arguendo* that the District Court erred in its ruling on either motion, the relief now available to appellant is far more limited than he imagines. If this Court holds that the plea of guilty to assault with a dangerous weapon should be withdrawn, then that case will revert to its pre-plea status. There being no bar to further prosecution under that indictment, appellant could be tried, convicted, and sentenced on that charge just as if the plea had never been entered. Not only would he not receive credit for the time already spent in custody; he would also be subject again to the maximum sentence, which, if the court saw fit to impose it, could keep him in prison considerably longer than he is already destined to be there. On the other hand, if this Court holds that the two sentences were unlawfully made to run consecutively, on the theory that assault with a dangerous weapon is necessarily included in manslaughter, then only the last three years of the manslaughter sentence would thereby be invalidated. He may lawfully be kept in prison up to the end of the maximum period allowed by statute, in this case fifteen years, to be computed from the date on which sentence was imposed. Recomputation of the sentence as proposed by appellant to run from the date of imposition of the first sentence (*i.e.*, for assault with a dangerous weapon) is precluded by statute, nor can he be credited by any other means with the time

served under the first sentence before imposition of the second.

ARGUMENT

1. Assault with a dangerous weapon is not a lesser included offense in manslaughter or murder

Appellant was indicted for and convicted of two separate offenses in violation of two different statutes. The greater part of his argument here is based on the premise that assault with a dangerous weapon, of which he was convicted in 1961, should be considered—indeed, must be considered—as an offense necessarily included in the supposedly greater offense of manslaughter, of which he was convicted in 1962. Examination of the pertinent authorities, however, demonstrates that his position is contrary to well-established legal principles. Thus unsupported, appellant's contentions must largely, if not entirely, collapse of their own weight.

The criteria for determining whether one offense is included in another have been repeatedly defined by the courts. The Supreme Court has held on one such occasion:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

And in another case:

> [T]his court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. *Morgan* v. *Devine*, 237 U.S. 632, 641 (1915).

See *Pereira* v. *United States*, 347 U.S. 1, 9 (1954); *Albrecht* v. *United States*, 273 U.S. 1 (1927); *Gavieres* v. *United States*, 220 U.S. 338 (1911); *Kendrick* v. *United States*, 99 U.S. App. D.C. 173, 238 F.2d 34 (1956); *Ekberg* v. *United States*, 167 F.2d 380 (1st Cir. 1948); *United States* v. *Bauer*, 198 F. Supp. 753 (D.D.C. 1961). Specifically, it has been held that for one offense to be necessarily[2] included in another, the two offenses must be such that it is impossible to commit the greater without having first committed the lesser. *Crosby* v. *United States*, No. 18322, decided November 25, 1964; *Larson* v. *United States*, 296 F.2d 80 (10th Cir. 1961); *Giles* v. *United States*, 144 F.2d 860 (9th Cir. 1944).

Appellant's principal complaint is that his sentences for assault with a dangerous weapon and manslaughter were imposed to run consecutively, his theory being that the former offense is necessarily included in the latter so that the sentences would have to be concurrent. This theory, unfortunately, is unsound.[3] Assault with a dangerous weapon is not necessarily included in manslaughter be-

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[2] See Rule 31 (c), F.R. Crim. P.

[3] In *Ekberg* v. *United States*, *supra* at 384-385, the court distinguished "two commonly recurring situations," citing several examples of each:

> (1) It is well settled that the same act or transaction may constitute two distinct federal offenses, and justify findings of guilty on two counts and separate sentences thereon to run consecutively, *if each offense as defined by Congress requires the proof of some fact or element not required to establish the other*. . . .
>
> (2) Another common situation is where the legislature has defined two distinct offenses, *but one offense requires proof of all the facts or elements necessary to establish the other, plus something more—in other words, a greater offense including a lesser*. . . . It is proper to prosecute the accused under an indictment with separate counts charging each of these offenses. If, however, the accused is convicted on both counts, sentences cannot lawfully be imposed on both counts, to run consecutively. (Emphasis added.)

Appellant mistakenly assumes that his situation fits in the second category, when actually, as we shall see, it belongs in the first.

cause each offense has an element not found in the other. In any case of assault with a dangerous weapon the use of a weapon must be alleged in the indictment and, if the case goes to trial, must be proved; however, there need be no showing of a homicide. In manslaughter, on the other hand (or even in first-degree murder, for which appellant was originally indicted in Criminal No. 255-62), the unlawful killing of one human being by another is the gravamen of the offense; no weapon need be employed. Manslaughter or murder can be committed without a weapon of any kind. Since each offense "requires proof of a fact which the other does not," as in *Blockburger*, *supra*, it necessarily follows that neither is included in the other.

The Supreme Court, to be sure, has stated in *Logan* v. *United States*, 144 U.S. 263, 307 (1892), that assault is a lesser included offense in an indictment for murder. *Logan*, however, does not stand for the proposition that assault *with a dangerous weapon* is similarly included in a murder (or manslaughter) indictment. Moreover, the Supreme Court has also held in *Diaz* v. *United States*, 223 U.S. 442 (1912), that a conviction of assault, followed by the death of the victim as a result of the assault, is not a bar to a subsequent prosecution of the assailant for murder. The same result was reached by this Court in *Hopkins* v. *United States*, 4 App. D.C. 430 (1894), the Court stating:

> [T]he great weight of authority is in support of the principle that when, after the first prosecution, a new fact suprevenes [*sic*], for which the accused is responsible, which changes the character of the offense, and together with the facts existing at the time, constitute a new and distinct crime, an acquittal or conviction of the first offense is not a bar to an indictment for the other distinct crime. 4 App. D.C. at 436-437.

Simple assault is necessarily included in murder or manslaughter, as the *Logan* case, *supra*, indicates. So is

assault with intent to kill. Cf. *Joyner* v. *United States*, 116 U.S. App. D.C. 76, 320 F.2d 798 (1963) (assault with intent to rob as lesser included offense in robbery).[4] But from either of these premises it does not follow that assault with a dangerous weapon can be similarly regarded; on the contrary, the additional element of the use of a weapon necessarily prevents such inclusion, regardless of what is actually proved or can be proved at a trial.

Directly in point is this Court's recent decision in *Crosby* v. *United States*, *supra*, wherein it was held that assault with a dangerous weapon is not necessarily included in the crime of robbery. *Accord*, *United States* v. *Bauer*, *supra*. Appellant maintains (Brief for Appellant, 11) that since proof of manslaughter under the murder indictment would have demonstrated that he shot Emma Lee Hill with a pistol, it must follow that assault with a dangerous weapon (*i.e.*, the pistol) is a lesser included offense in manslaughter, at least insofar as this case is concerned. But here, as in *Crosby*, the nature and quantum of proof available are totally irrelevant. It makes no difference whether the evidence in any given case might show that the accused committed another crime in addition to the one with which he was charged. The fundamental question is whether the evidence in *all* cases *must* show that the accused committed an additional offense. Only when the latter standard is met can it be said that one offense is necessarily included in another. See *Ekberg* v. *United States*, *supra* at 385.

The cases on which appellant relies are all clearly inapposite. In *Evans* v. *United States*, 98 U.S. App. D.C. 122, 232 F.2d 379 (1956), the defendant was convicted of unauthorized use of a vehicle and grand larceny of

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[4] Robbery under the local statute (22 D.C. Code § 2901) can be committed without an assault. *Spencer* v. *United States*, 73 App. D.C. 98, 116 F.2d 801 (1940); *Turner* v. *United States*, 57 App. D.C. 39, 16 F.2d 535 (1926). However, if the evidence during the trial clearly shows that an assault was committed by the accused in the course of perpetrating a robbery, then he may validly be convicted of assault with intent to rob as a lesser included offense. *Joyner* v. *United States*, *supra*.

the same vehicle and received concurrent sentences. In the light of *Blockburger*, *Crosby*, and other cases, *supra*, unauthorized use is unquestionably a lesser included offense in grand larceny, so that concurrent sentences would be required under *Ekberg* (cited by the Court in *Evans*). *Prince* v. *United States*, 352 U.S. 322 (1957), and *Heflin* v. *United States*, 358 U.S. 415 (1959), deal with a specific statute, the Federal Bank Robbery Act (18 U.S.C. § 2113), and by their own limitations do not lay down any broad principles of general application. The Supreme Court in *Prince* took pains to point out that "we are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar problems in this general field raised under other statutes." 352 U.S. at 325. In *Bell* v. *United States*, 349 U.S. 81 (1955), the Court was confronted with an ambiguity in the statute as to the unit of prosecution and construed the statute against the imposition of the harsher penalty.[5] Again in *Ladner* v. *United States*, 358 U.S. 169 (1958), after deciding that it was not presented with a constitutional issue but merely a question of statutory construction, the Court found that the legislative history of the statute under consideration "sheds no real light on what Congress intended to be the unit of prosecution," 358 U.S. at 175, and resolved the ambiguity in favor of lenity. See also *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), another unit-of-prosecution case.

On the basis of the *Ladner*, *Heflin*, and *Prince* cases appellant urges on this Court a "policy of lenity," even going so far as to suggest (Brief for Appellant, 8-9 and n.1) that there is a presumption in favor of lenity which can be overcome only by a showing of contrary legislative

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[5] In *Bell* the Supreme Court held that the simultaneous transportation of two women in interstate commerce for immoral purposes constituted only one violation of the Mann Act. Compare *Nelms* v. *United States*, 291 F.2d 390 (4th Cir. 1961) (same woman, two trips; *held*, two violations of the Mann Act, punishable consecutively).

intent. But the doctrine of lenity, "as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). After rejecting an argument similar to that made here by appellant, the Court in *Callanan* stated:

> This is an ordinary case of a defendant convicted of violating two separate provisions of a statute, whereby Congress defined two historically distinctive crimes composed of differing components. . . . It was therefore within the discretion of the trial judge to fix separate sentences . . . . 364 U.S. at 597.

The same may be said of the case at bar. Here there is no ambiguity in the statutory provisions under which appellant was convicted and thus no predicate for lenity. There is no basis whatever for regarding assault with a dangerous weapon as a lesser included offense in the crime of manslaughter.

2. Appellant's guilty plea to the charge of assault with a dangerous weapon was validly entered, and the motion to withdraw the plea was properly denied

(B Tr. 1-9)

A motion to withdraw a plea of guilty is addressed to the discretion of the court. When such a motion is filed after the imposition of sentence, as was appellant's motion in this case, the only limitation on the exercise of that discretion is the provision of Rule 32 (d), F.R. Crim. P., that "to correct manifest injustice" the court may permit the withdrawal of a plea. See *Smith* v. *United States*, 116 U.S. App. D.C. 404, 324 F.2d 436 (1963), *cert. denied*, 376 U.S. 957 (1964). The burden of proving manifest injustice is on the movant. *Watts* v. *United States*, 107 U.S. App. D.C. 367, 278 F.2d 247 (1960).

Appellant has failed to sustain his burden. The only showing made here (Brief for Appellant, 21-22) consists of speculation as to the mental processes of appellant and his counsel at the time the plea was entered and idle

guesses as to what might have happened if there had been no plea. On its face such conjecture is totally insufficient to sustain a motion under Rule 32 (d). Never at any time has appellant denied his guilt of either offense of which he was convicted. Never has he suggested that he might have had a defense to either charge. The maximum sentence allowable under the law was not imposed on appellant in either case. The death of Emma Lee Hill could have led appellant to the electric chair or kept him behind bars for the rest of his days. As things turned out, however, he will be released from prison in the foreseeable future on a date certain, at which time he can resume his normal life more or less as he left it. In appellee's view no manifest injustice is discernible in any aspect of this case.

Alternatively, appellant suggests that his plea was entered without full understanding of its consequences. Appellee finds appellant's logic deficient. Neither the death of Emma Lee Hill nor the ensuing murder indictment can be said to be a "consequence" of appellant's plea of guilty to the charge of assault with a dangerous weapon. There is no demonstrable causal nexus between that plea and appellant's subsequent conviction of manslaughter. The only event of which the manslaughter conviction can be said to be a consequence is appellant's unlawful act of shooting Emma Lee Hill. The former flowed directly from the latter, and the flow was not interrupted or diverted by the intervening plea in Criminal No. 443-61. Appellant complains (Brief for Appellant, 21) "that he was not advised of the maximum punishments for murder or manslaughter, and that he was not advised that his plea of guilty could be used against him at a trial for these offenses . . . ." But at the time his plea was entered to the charge of assault with a dangerous weapon there had

been no murder or manslaughter, and thus there was no occasion for anyone to give him such advice.[6] The only consequence of appellant's plea revealed by this record is the sentence of three to nine years imposed by Judge McGarraghy. The motion to withdraw the plea was properly denied. Cf. *Smith* v. *United States, supra.*

3. The manslaughter sentence was legal; its being made consecutive to the sentence for assault with a dangerous weapon does not make it illegal

(A Tr. 1-44)

Appellant conceded below (A Tr. 31) and concedes here (Brief for Appellant, 15) that he "does not contest the propriety of his conviction for manslaughter nor the legality of his sentence except insofar as it was to run consecutively with his sentence for assault with a dangerous weapon." His concession puts him out of court. The sentence of three to nine years imposed on appellant, well within the statutory maximum of fifteen years for manslaughter, was authorized by law. It is thus not an illegal sentence within the meaning of Rule 35, F.R. Crim. P. "Sentences subject to correction under that rule are those that the judgment of conviction did not authorize." *United States* v. *Morgan*, 346 U.S. 502, 506 (1954). The illegality contemplated by Rule 35 is one which is disclosed by the record, such as a sentence in excess of the statutory maximum or in some other way contrary to the applicable statute. *United States* v. *Rader*, 185 F. Supp. 224 (W.D. Ark. 1960), *aff'd*, 288 F.2d 452 (8th Cir.), *cert. denied*, 368 U.S. 851 (1961). No such illegality can be

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[6] If Emma Lee Hill had not failed to seek the medical treatment which she required, she might have lived more than a year and a day after the shooting, in which case appellant could not have been charged with killing her. It was only her death within that period that gave rise to the murder indictment; appellant's plea had nothing to do with it. The decedent's failure to take proper care of herself, of course, did not break the chain of causality between the shooting and her death. *Hopkins* v. *United States, supra; United States* v. *Hamilton*, 182 F. Supp. 548 (D.D.C. 1960).

found on this record. Nor is there any illegality in the cumulation of two sentences, each of which is otherwise legal. Appellant was convicted of two distinct offenses on two different occasions. The imposition of consecutive sentences is proper when there are violations of different and separate statutes, even though the offenses may have arisen, as in this case, out of the same transaction. *Wilson* v. *United States*, 310 F.2d 879 (10th Cir. 1962); cf. *United States* v. *Koury*, 319 F.2d 75 (6th Cir. 1963). The duration of a sentence within the statutory limit is a matter within the discretion of the sentencing court and can be disturbed upon review only if that discretion has been abused. *Epperson* v. *Anderson*, 117 U.S. App. D.C. 122, 326 F.2d 665 (1963). The mere fact that sentences for two separate offenses are made to run consecutively does not constitute an abuse of discretion. *Pependrea* v. *United States*, 275 F.2d 325 (9th Cir. 1960).

Citing *Tatum* v. *United States*, 114 U.S. App. D.C. 49, 310 F.2d 854 (1962), appellant argues that the imposition of a consecutive sentence for manslaughter was tantamount to increasing a sentence already imposed, which is contrary to law. Appellant's contention rests ultimately on his earlier insistence that assault with a dangerous weapon is necessarily included in the "greater" offense of manslaughter (see Brief for Appellant, 17). As we have seen (Argument 1, *supra*), it is not. Here we are dealing with two separate sentences for two separate offenses; *Tatum* is concerned with two different sentences successively imposed for the same offense and thus has no application. The sentence imposed by Judge Jones did not unlawfully increase that fixed by Judge McGarraghy but was for an altogether different crime. There is thus no error either in the imposition of the manslaughter sentence, in its duration, or in its being made to run consecutively to the earlier one.

4. (Pretermitting Arguments 1, 2, and 3.) The only relief available to appellant is the curtailment of his manslaughter sentence by three years or trial on the assault with a dangerous weapon indictment

If this Court holds that the District Court erred either in denying appellant's motion to withdraw his guilty plea to the assault with a dangerous weapon charge or in denying his motion for correction of the manslaughter sentence, there remains the very practical problem of just what to do with the case. Allowance of withdrawal of the plea would simply put the assault with a dangerous weapon case back in the same status as when the plea was entered in July 1961. Since assault with a dangerous weapon is not a lesser included offense in manslaughter, there is no impediment to further prosecution of the former charge if the guilty plea is withdrawn. *Crosby* v. *United States*, *supra*, slip opinion at 3-4 and n.1. Upon trial and conviction appellant could be sentenced *de novo* to the maximum allowable under the statute: ten years.[7] He would not be entitled to any credit for the time spent in jail prior to the imposition of such sentence, since under 18 U.S.C. § 3568 it would not begin to run until the date on which appellant "is received at the penitentiary, reformatory, or jail for service of said sentence," which obviously could not occur until after it is imposed. It can thus be readily seen that withdrawal of appellant's guilty plea in Criminal No. 443-61 might well result in his spending more time in prison than he is already scheduled to serve.

If illegality under Rule 35 is to be found in the cumulation of the two sentences, it must be based on the proposition that assault with a dangerous weapon is necessarily included in manslaughter. Under that theory, as appel-

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[7] When a convicted defendant successfuly attacks his sentence, he can be "validly resentenced though the resentence increase[s] the punishment." *Hayes* v. *United States*, 102 U.S. App. D.C. 1, 2, 249 F.2d 516, 517 (1957), *cert. denied*, 356 U.S. 914 (1958); see *King* v. *United States*, 69 App. D.C. 10, 98 F.2d 291 (1938).

lant indicates at page 15 of his brief, he is now serving a six- to eighteen-year sentence for an offense punishable by a maximum of fifteen years. In such a situation only that portion of the sentence in excess of the legal maximum is void. The remainder is perfectly valid, and the excess can be severed from the valid portion without disturbing its legality. *United States* v. *Pridgeon*, 153 U.S. 48 (1894); *Jones* v. *United States*, 80 U.S. App. D.C. 109, 151 F.2d 289 (1945); *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *McKinney* v. *Finletter*, 205 F.2d 761 (10th Cir. 1953). Thus the only relief available to appellant under Rule 35, assuming *arguendo* that he is entitled to any relief at all, is the curtailment of his manslaughter sentence by three years so as to make it expire on November 16, 1977, less good-time credit under 18 U.S.C. § 4161.[8] Appellant's proposal to vacate the conviction of assault with a dangerous weapon with directions to dismiss the indictment, resulting in a credit of the time already served under that conviction toward the service of his manslaughter sentence,[9] in appellee's view

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[8] The express language of 18 U.S.C. § 3568 prohibits recomputation of the manslaughter sentence along the lines suggested by appellant at page 18 of his brief—*i.e.*, to commence August 25, 1961.

Appellant mistakenly believes that his manslaughter sentence began to run on August 25, 1964, the date on which he completed service of the minimum portion of his sentence for assault with a dangerous weapon. Evidently appellant misunderstands the provisions of the indeterminate sentence statute, 24 D.C. Code § 203. An indeterminate sentence is one for the maximum period imposed by the court. The only purpose of including a minimum period in the sentence is to fix a date when a convicted defendant will become eligible for parole, which under our statute is not more than one-third of the maximum. Appellant's sentence for assault with a dangerous weapon will not expire until August 25, 1970, nine years after its imposition; his manslaughter sentence will then begin to run. The combined sentences will cause appellant to become eligible for parole on August 25, 1967, but beyond that the minimum portions of the two sentences have no function. See *Story* v. *Rives*, 68 App. D.C. 325, 97 F.2d 182, *cert. denied*, 305 U.S. 595 (1938).

[9] As was done in *Blitz* v. *United States*, 153 U.S. 308 (1894), and *Ekberg* v. *United States*, *supra*.

is untenable under the rationale of *Evans* v. *United States, supra.*

CONCLUSION

Wherefore, it is respectfully submitted that the judgments of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOHN A. TERRY,
Assistant United States Attorneys.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,583 and 18,923, Consolidated

JOHN H. DAVENPORT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Rawlings Ragland,

616 Investment Building
Washington, D. C. 20005

Attorney for Appellant,
appointed by this Court

Thomas J. Schwab,
of Counsel

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UNITED STATES COURT OF APPEALS
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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

I. THE DETERMINATION OF WHETHER ONE OFFENSE IS NECESSARILY INCLUDED WITHIN ANOTHER MUST BE BASED NOT ONLY UPON THE STATUTORY LANGUAGE BUT ALSO UPON THE INDICTMENT AND THE EVIDENCE IN THE PARTICULAR CASE -- UNDER SUCH A TEST, ASSAULT WITH A DANGEROUS WEAPON WAS AN OFFENSE NECESSARILY INCLUDED WITHIN MANSLAUGHTER IN THIS CASE.

The substance of the Government's first argument is that assault with a dangerous weapon is not a necessarily included offense to manslaughter, because the offense of assault with a dangerous weapon requires proof of an element not required for manslaughter (i.e., a dangerous weapon), while the offense of manslaughter requires proof of an element not required for assault with a dangerous weapon

(i.e., death). As so stated, the test of whether one offense is a necessarily included offense to another would be identical with the test of whether there are two offenses or but one, i.e., the test of Blockburger v. United States, 284 U.S. 299 (1932), which is whether each offense, as defined in the statute, requires proof of a fact which the other does not. And, says the Government, the evidence in the case is totally irrelevant.

As indicated on pages 9-13 below, a determination that assault with a dangerous weapon is a necessarily included offense to manslaughter within the technical rules adopted by courts in deciding whether a defendant is entitled to an instruction on a lesser offense or whether the Government may convict on an offense not charged in the indictment is not necessary in order to sustain appellant's contention that the statute establishing these crimes should be interpreted as not authorizing cumulative punishment where both are committed by a single act. Nevertheless, appellant believes the Government's position is clearly incorrect, and will state herein the reasons why this is so.

The Government is correct insofar as its position implies that if two offenses are defined by statute in such a way that all of the elements of one constitute some of the elements of another, the former is an offense necessarily included within the latter. The defect in the Government's position is that it considers the foregoing to be the only test for determining if one offense is necessarily included within another. The cases which have already been presented to this court, however, both in appellant's brief

and in the Government's, demonstrate that there are other situations in which one offense is necessarily included within another, i.e., that even though an element of one offense as defined by the statute is not included in the other offense as defined by the statute, the former may nevertheless be necessarily included within the latter under the circumstances of the case. These cases demonstrate that where proof of one offense as that offense is set forth in the indictment in the particular case would necessarily constitute proof of another offense, the latter is necessarily included in the former in that case.

That the indictment must be considered, in determining whether one offense is necessarily included within another, is strikingly illustrated in Evans v. United States, 98 U.S. App. D.C. 122, 232 F.2d 379 (1956), the Government's analysis of which appellant submits is incorrect. In that case, the defendant was convicted of unauthorized use of a vehicle and of grand larceny of the same vehicle. The Government makes the flat statement (Gov't. Brief, p. 10) that unauthorized use is "unquestionably a lesser included offense in grand larceny." Such a result, however, could not possibly flow from the test now urged by the Government, for it is clearly possible to prove grand larceny without proving unauthorized use of a vehicle -- in fact, such is always the case where the larceny involves any property other than a vehicle. In terms of the Government's test, the statute defining the allegedly lesser offense -- unauthorized use -- clearly includes an element which the statute defining the allegedly greater offense -- grand larceny --

does not -- namely, a vehicle; yet the Government states that the former is "unquestionably" included in the latter. What the Government meant to say, of course, was that unauthorized use was a lesser included offense to grand larceny in that case, for the simple reason that the indictment in that case charged grand larceny of a vehicle, and the only larceny proved was that of a vehicle. Thus, while in many cases it is quite possible to prove grand larceny without also proving unauthorized use, it was not possible in that case, because the indictment charged grand larceny of a vehicle. By the same token, while it is often possible to prove manslaughter without at the same time proving an assault with a dangerous weapon, it was not possible in the instant case because the charge in the indictment was shooting with a pistol, the only charge which could have been made, given the facts of the case, and it would not have been possible to prove manslaughter by pistol shooting without at the same time proving assault with a dangerous weapon; assault with a dangerous weapon was therefore a lesser included offense to manslaughter in this case.

The Government contends that Crosby v. United States, No. 18322, decided November 25, 1964, supports its view that the existence in the allegedly lesser included offense of an element not involved in the allegedly greater offense precludes the possibility of the former being a lesser included offense to the latter. Appellant submits that an examination of the court's opinion in that case makes clear that it is in no way inconsistent with what appellant contends is the proper statement of the rule. This is so

because in the Crosby case proof of the allegedly greater offense, not only as stated in the statute but even as charged in the indictment, would not have required proof of the allegedly lesser offense. The indictment charged that defendant had stolen property from the person of the victim. It is obvious that guilt could be proved under this indictment without at the same time proving assault with a dangerous weapon, not only because of the statutory element of a dangerous weapon in the allegedly lesser offense, but also because no dangerous weapon was referred to in the indictment and no proof of such a weapon was needed in order to convict. That the court in Crosby was fully aware of the importance of the indictment is demonstrated by its statement early in the opinion (slip opinion, p. 2) that:

> "At the outset we must be mindful that the question is not whether appellant could have been charged on one count of assault with a dangerous weapon but whether the indictment as drawn covers and includes this act."

The fact that one must go beyond the statutory definition to determine whether one offense is included in another is further illustrated by the Joyner and Giles cases cited by the Government (Gov't. Brief, pp. 7 and 9) and by the Berra case cited by appellant (Appellant's Brief, p. 10). In Joyner, it was not possible, on the basis of the wording of the statutes or even on the basis of the wording of the indictment, to state that proof of the allegedly greater offense would require proof of the allegedly lesser offense. Nevertheless, as appears in the Government's own description of the

case in footnote 4 of its brief (Gov't. Brief, p. 9), the court went beyond the statute and the indictment and looked to the evidence, holding that the defendant could be convicted of the allegedly lesser offense where the evidence actually produced proved commission of that offense. Again, in Giles, the court clearly went beyond the words of the statute and looked not only to the indictment but to the evidence. In that case, the court, after setting forth in detail the facts disclosed at the trial, concluded:

> "There is no evidence of an intent to kill or that the appellant flourished the rifle or pointed it * * *. (emphasis added)" 144 F.2d at 861.

Such an analysis cannot be reconciled with the Government's position that the evidence is irrelevant in determining whether one offense is included in another.

In Berra v. United States, 351 U.S. 131, 134 (1955), quoted in footnote 3 (pages 11 and 12) of appellant's brief, the Supreme Court makes clear that where some of the elements of a crime themselves constitute a lesser crime, a defendant would be entitled to an instruction on the lesser crime "if the evidence justified it. (emphasis added)" If the Government's statement of the test for determining the existence of a lesser included crime were correct, this rule of law laid down by the Supreme Court would be meaningless, for the evidence would always justify the instruction, since, by statutory definition, it would in every case be impossible to prove the greater offense without proving the lesser. It is clear, therefore, that the determination of whether one offense is included in another must go beyond the mere statutory provisions.

In summary, therefore, the cases cited by both appellant and the Government clearly demonstrate that one offense is not precluded from being necessarily included within another by reason of the fact that statutory definition of the former includes an element not present in the latter, and that, where such is the case, if it appears from the indictment that the latter cannot be proved without proving the former, the former is necessarily included within the latter. Appellant has demonstrated, by his analysis of the indictments in this case on pages 10 and 11 of his brief, that such is precisely the situation here.

If further argument is necessary to demonstrate the fallacy of the Government's position, it may be found in the proceedings in this Court in Bartley v. United States (No. 18,251, decided by Order dated March 27, 1964). In that case, the defendant was originally indicted for murder, was convicted of manslaughter, the conviction was reversed for procedural errors, and the defendant was retried on the original indictment and convicted of assault with a dangerous weapon. On the second appeal, the defendant raised a point the resolution of which required a determination of whether assault with a dangerous weapon in that case was a lesser included offense to manslaughter. The Government, on page 10 of its brief in that case, answered the defendant's contention unequivocally with the following words:

> "Clearly, assault with a dangerous weapon is a lesser included offense of a homicide committed with a pistol."

As authority for this proposition, the Government cited the very

same cases which appellant in the instant case has cited for the same proposition and which the Government now disclaims -- i.e., the Logan and Hamilton cases. This Court affirmed the conviction, thereby, of necessity, accepting the Government's contention.[1/]

The action taken by this Court in the Bartley case establishes that assault with a dangerous weapon is a lesser included offense to manslaughter in this case. It is inconceivable to appellant that the Government would knowingly contend that assault with a dangerous weapon was a lesser included offense to manslaughter in a case in which such a contention resulted in affirmance of a conviction but take the contrary position where the result would be reversal. For this reason, appellant is sure that the Government unintentionally erred in its analysis of the problem in its brief in this case, and that it will stand by the position which it urged upon this Court in Bartley and which this Court accepted.

[1/] While the Court did not discuss the point in its order affirming the conviction, it is clear that a necessary ingredient of the Court's affirmance was acceptance of the Government's position, for if assault with a dangerous weapon in that case was not a lesser included offense to manslaughter, the District Court would have been without jurisdiction to convict Bartley of assault with a dangerous weapon, and the jurisdictional question had been pointed out to the court -- see pages 10 and 11 of the Government's brief in Bartley; see also Crosby v. United States, supra.

II. APPELLANT'S POSITION IS NOT THAT CONGRESS COULD NOT CONSTITUTIONALLY HAVE PROVIDED FOR CUMULATIVE PUNISHMENT FOR ASSAULT WITH A DANGEROUS WEAPON AND MANSLAUGHTER WHEN BOTH ARE COMMITTED BY A SINGLE ACT, BUT RATHER THAT THE PROPER CONSTRUCTION OF THE STATUTORY LANGUAGE IS THAT CONGRESS DID NOT SO PROVIDE.

Misled by its erroneous view that assault with a dangerous weapon in this case was not a lesser included offense to manslaughter, the Government does not seem to have appreciated the full substance of appellant's major argument under the first argument heading in his brief. Rather than repeat the contentions of his brief, however, appellant would like merely to summarize them in the light of the points made by the Government.

It is conceded that assault with a dangerous weapon and manslaughter each involve additional elements that the other does not, and, accordingly, that under the Blockburger line of cases a defendant could, constitutionally, and notwithstanding the doctrine of double jeopardy, be convicted of both crimes resulting from a single act on his part, and could, constitutionally, be sentenced to consecutive punishments therefor. The issue posed by this case is therefore not the one involved in most of the cases relied upon by the Government, that is, whether Congress could constitutionally have provided cumulative punishment for a single act, but rather the issue of whether Congress did in fact do so in the statute here involved.

Appellant has cited a number of cases in which courts have been called upon to consider whether a legislature intended that cumulative punishment be imposed where two offenses are

committed by a single act. As set forth in the first part of Argument I in appellant's brief, where there is ambiguity as to whether such a result was intended, courts have resolved that ambiguity by applying the rule of lenity, and have accordingly concluded that there was no such intention. Appellant has further contended, in the second part of Argument I in his brief that such a result is invariably reached in those cases in which the two offenses committed by a single act are in fact gradations of severity of the same essential wrongdoing -- i.e., where one is a lesser included offense to the other.

The interest sought to be protected by Congress in its legislation on assault with a dangerous weapon, assault with intent to kill, manslaughter and murder is obviously the protection of one human being from the infliction of injury or death by another human being. Appellant has asserted in his brief, and the Government has not denied, that the overwhelming practice of courts in this jurisdiction as well as at common law has always been to punish the infliction of injury or death by one person upon another by conviction of the most serious of the various crimes in this category which the jury finds has been committed. It has never been the practice of criminal courts where one has caused the death of another to convict him of all possible crimes involving injury or death to the person of another which might have been involved in his single act, even though in most such homicides the evidence would show guilt of one or more other such crimes, such as assault with a dangerous weapon or assault with intent to kill.

In the light of this historical practice, the question surely arises whether Congress, in adopting the statute now codified in the District of Columbia law on assault with a dangerous weapon and manslaughter, intended, notwithstanding such practice, that cumulative punishment be imposed where both crimes, being gradations in severity of the same essential wrongdoing, are committed in a single shooting. The ambiguity thus created is to be resolved, as indicated in appellant's brief, in the light of the prevailing practice both before and after passage of the legislation, and by application of the rule of lenity.

Appellant has contended that assault with a dangerous weapon is a lesser included offense to manslaughter in the sense described above -- i.e., in the sense that the former is a less severe offense involving the same kind of prohibited conduct and the protection of the same interest of society as the latter. The purpose of demonstrating that assault with a dangerous weapon is a lesser included offense to manslaughter in this sense is to provide an indication of whether Congress, in creating these two offenses, intended that cumulative punishment be imposed for the two offenses when they are committed by a single act -- the argument being that if assault with a dangerous weapon is an included offense to manslaughter in this broad sense, it is highly unlikely that such cumulative punishment was intended.

Appellant also contended in his brief that assault with a dangerous weapon, under the circumstances of this case, was not only a lesser included offense to manslaughter in this broad sense,

but that it was also a necessarily included offense to manslaughter within the technical rules which have been established for purposes of determining whether a defendant is entitled to an instruction on a lesser offense and whether the Government may convict on a lesser offense not set forth in the indictment. The importance of this contention is that, as pointed out in appellant's brief and apparently not denied by the Government, there is substantial judicial authority for the proposition that cumulative punishment for two offenses is not authorized where one is necessarily included in the other. For the reasons set forth on pages 10-12 of appellant's brief and on pages 1-8 of this reply brief, appellant maintains that assault with a dangerous weapon under the circumstances of this case is a necessarily included offense to manslaughter even under these technical rules, and that the Government's contention to the contrary is erroneous. Nevertheless, and for the reasons set forth above, even were this Court to accept the Government's position and hold that assault with a dangerous weapon is not necessarily included in manslaughter in this case under such technical rules, such a holding would not detract from appellant's contention that assault with a dangerous weapon is a lesser included offense to manslaughter in the broader sense described above -- namely, that it is a less severe offense involving the same kind of prohibited conduct and the protection of the same interest of society as manslaughter -- and that this meaning of lesser included offense is of importance in ascertaining the legislative intent.

It is submitted that the key to the difference in the positions of the Government and appellant in this case lies in the distinction between this Court deciding what Congress could constitutionally do and this Court deciding what Congress has in fact done. The cases primarily relied upon by the Government, the Blockburger line of authority, deal with the power of the legislature to impose cumulative punishment where two separate offenses are committed by a single act. But the question must always be asked not only whether the legislature had such a power but whether that power was exercised. In other words, it must always be open to a defendant to demonstrate, if he can, that a legislature which created two offenses did not intend that they be applied so as to result in cumulative punishment for but a single act. It is submitted that where appellant has shown that the almost universal practice, both at common law generally and in this jurisdiction in particular, has been not to impose cumulative punishment under circumstances such as those here involved -- i.e., where the two offenses are but gradations in severity of the same essential wrongdoing -- he has raised a substantial question as to whether Congress intended the contrary, and that in the absence of legislative history showing an intent to impose cumulative punishment despite the historical practice, the rule of lenity should be applied, with the result that this Court should conclude that Congress, while it may have had the power to impose cumulative punishment under the facts of this case, did not in fact exercise it.

III. THE PROCEDURAL DISPOSITIONS OF THIS CASE REQUESTED BY APPELLANT ARE NOT PRECLUDED BY EITHER THE CASES OR THE STATUTE RELIED UPON BY THE GOVERNMENT IN OPPOSING SUCH DISPOSITIONS.

Under argument headings II and III(B) of his brief, appellant set forth the specific procedural dispositions which he believes the Court should make in this case, depending upon which of appellant's substantive positions are accepted by the Court. The Government's views on this question are set forth in argument heading IV of its brief (Gov't. Brief, pp. 15-17).

Disposition if the Court accepts appellant's contentions with respect to cumulative punishment. Appellant's contention is that in this event, the proper remedy would be to correct the manslaughter sentence so that it would run concurrently with the sentence for assault with a dangerous weapon. This contention is based upon the propositions that (1) the authorities which prescribe cumulative punishment in these cases hold that the two sentences must run concurrently, and that (2) there is no reason for the lower court to resentence appellant for manslaughter because, in view of Tatum v. United States, 114 U.S. App. D.C. 49, 310 F.2d 854 (1962), appellant could not be resentenced to a term any longer than that of the present sentence.

As appellant understands the Government's position, it is that such a disposition of the case is not warranted because (1) cumulative punishment may be avoided by simply reducing the total punishment under both offenses to the maximum which could have been imposed for the greater offense -- i.e., fifteen years, or three years less

than the present combined sentences; (2) the Tatum case does not apply because appellant has not begun to serve his sentence for manslaughter; and (3) the manslaughter sentence cannot be made concurrent with the assault with a dangerous weapon sentence because of the provisions of 18 U.S.C. Sec. 3568.

With respect to the first of the Government's contentions, appellant relies upon the authorities cited in his brief for the proposition that in order to avoid cumulative punishment, concurrent and not consecutive sentences must be imposed -- the Court's attention is directed particularly to the language of the Evans case set forth on page 7 and the statement by the Government itself in its brief in the Naples case, cited in footnote 2, page 10.

With respect to the second of the Government's contentions, it is submitted that where consecutive sentences are imposed upon a defendant, the time at which he is determined to have started serving the second such sentence will depend upon the purpose for which such a determination is made. The Government apparently concedes that appellant is now serving his second sentence, for the purpose of determining when he may be released on parole. Appellant, on the other hand, would concede that he is not yet serving his second sentence for the purpose of determining the maximum length of time within which he may be incarcerated under the two sentences. The issue before the Court, accordingly, is whether appellant is serving that sentence for purposes of the application of the Tatum rule -- namely, for determining whether he may now be resentenced for manslaughter to a greater period of time than that provided in the

original sentence for manslaughter. Appellant has found no cases directly in point on this specific issue. He stands, however, by the authority of the Supreme Court in Greene v. United States, 358 U.S. 326 (1959) (Appellant's Brief, p. 15) for the proposition that for purposes of determining the imprisonment authorized by two consecutive sentences, the second consecutive sentence began to run upon completion of the minimum portion of the first sentence, even though for purposes of determining the maximum length of detention, the second sentence would not begin until termination of the entire first sentence.

The Government's third contention is that correction of the manslaughter sentence to make it run concurrently with the assault sentence is prohibited by the provisions of 18 U.S.C. Sec. 3568. Appellant contends that this statute does not impose such a restriction upon the sentencing power of the District Court or upon the appellate power of this Court.

Appellant submits that this statute is designed to deal with the matter of commencement of sentence only insofar as that matter relates to physical incarceration of the defendant, but that it is not designed to restrict the power of the sentencing court to direct that its sentence run concurrently with another sentence. For example, there is no doubt that the statute would prohibit a District Court from directing that a sentence commence prior to the time that a defendant was physically received at a Federal penal institution. But the court does have power in imposing a sentence to determine when the defendant is deemed to have been "received at

the penitentiary, reformatory or jail for service of said sentence" (emphasis added). Accordingly, when a defendant is received at a jail following imposition of two consecutive sentences, he is deemed to have been received for service only of the first of the two sentences and not for service of the second. On the other hand, on the day the first sentence has been served, that defendant would be deemed to be received in the same jail for service of the second sentence, even though his physical location has not changed.

Appellant sees nothing in this statute which prohibits a sentencing court from accomplishing what might be considered the converse of the consecutive sentence situation described above -- i.e., from directing that the sentence it imposes shall run concurrently with a sentence already being served in a federal institution. The effect of such a sentence, in the words of the statute, is simply that a defendant, who was previously received at a jail for service of a prior sentence, is now deemed to have been received not only for service of that sentence but also for service of the sentence which the court now imposes.

In summary, appellant submits that the statute relied upon by the Government is not intended as limiting the power of sentencing courts to determine that sentences should run consecutively or concurrently, or as limiting the power of this Court now to direct that a sentence be corrected so that it begins to run on a day prior to the day upon which it was either corrected or imposed. It is not believed that the Government would dispute the fact that there are circumstances in which consecutive sentences are unauthorized

and concurrent sentences are required. Yet, if the Government's position with respect to this statute were correct, it would not be possible for an appellate court effectively to correct the erroneous action of a District Court which, in such a situation, imposed a consecutive sentence. It is inconceivable to appellant that such could have been the intention of this statute.

Even assuming, arguendo, that the Government's contention concerning this statute were correct, the same result as that originally requested by appellant can and should be accomplished by a correction, pursuant to Rule 35, Fed. Rul. Crim. Proc., of the manslaughter sentence by this Court (1) so that it runs concurrently with the assault with a dangerous weapon sentence insofar as this is possible consistent with the Government's interpretation of 18 U.S.C., Sec. 3568, which presumably would make it begin to run as of the date it was originally imposed, and (2) so that it be reduced by the amount of time which had elapsed between the time appellant began serving his sentence for assault with a dangerous weapon and the date he was sentenced for manslaughter. Such a disposition of the case would, within the limitations imposed by acceptance of the Government's interpretation of the statute, bring about the result which appellant contends is required here -- the elimination of cumulative punishment for the two offenses.

Disposition if the Court rejects appellant's contentions with respect to cumulative punishment but accepts his contentions with respect to withdrawal of the plea of guilty of assault with a dangerous weapon. In his brief, appellant contended that in this

event, the proper disposition of the case would be to dismiss the indictment for assault with a dangerous weapon, for the reason that, it being a lesser included offense to manslaughter in this case and appellant having been convicted of manslaughter, he could not now be tried for the lesser included offense, citing Hans Nielsen, Petitioner, 131 U.S. 176 (1889) (Appellant's Brief, p. 23).

In making this argument in his brief, appellant believed it highly unlikely that the Court would reach a point in this case where the Nielsen case would be applicable. The reason for this belief was that Nielsen would apply only if the Court held both that (1) assault with a dangerous weapon was a necessarily included offense to manslaughter, and (2) cumulative punishment for assault with a dangerous weapon and manslaughter could properly be imposed upon appellant; and since appellant believed that cumulative punishment could not be imposed for two offenses of which one is necessarily included in the other, he did not think it possible that the Court could reach both of these conclusions. The argument was made, however, because appellant could not be sure that the Government would accept his contention that cumulative punishment cannot be imposed for two offenses one of which is necessarily included in the other.

As appellant reads the Government's brief, no contention is made therein that cumulative punishment may be imposed for two offenses where one is necessarily included in the other, and it appears that the Government agrees with appellant on this point, while, of course, contesting that assault with a dangerous weapon

is in fact necessarily included in manslaughter. Accordingly, it would appear that the situation described in argument heading III(B) of appellant's brief cannot arise, and the Nielsen case will not be relevant to the disposition of this case.

In the event the Court rejects appellant's contentions with respect to cumulative punishment but holds that the motion to withdraw the plea of guilty to assault with a dangerous weapon should have been granted, presumably the Government contends that the manslaughter sentence would begin to run as of the date it was imposed -- i.e., November 16, 1962 -- while appellant has contended, on the basis of Blitz v. United States, 153 U.S. 308 (1894), that the manslaughter sentence would date back to the beginning of the running of the assault with a dangerous weapon sentence -- the difference between appellant and the Government on this point apparently relates to their respective interpretations of 18 U.S.C., Sec. 3568. The question would still remain in such event, however, what action could thereafter be taken on the assault with a dangerous weapon charge.

The Government assumes that appellant could be tried again on that charge. Appellant believes that there may well be legal issues which would bar such a trial. Since, however, such legal issues might require development of facts not now before this Court, and since it is speculative whether the Government would, even if it could, require appellant to stand trial for assault with a dangerous weapon at such a late date, appellant does not believe it necessary for this Court to consider such issues in this appeal.

CONCLUSION

For the reasons set forth above and in appellant's brief, it is submitted that the Court should vacate appellant's sentence for manslaughter and direct that it be corrected to run concurrently with his sentence for assault with a dangerous weapon -- i.e., to commence as of August 25, 1961. If the Court does not grant such relief, it is submitted that the Court should set aside appellant's conviction for assault with a dangerous weapon.

Respectfully submitted,

Rawlings Ragland
616 Investment Building
Washington, D. C. 20005
Attorney for Appellant
Appointed by this Court

Thomas J. Schwab
of Counsel